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In the Supreme Court of the United States

OCTOBER TERM, 1979

FREDERICK JOHN FAZIO AND JOSEPH HENRY CUSANELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether police officers, who had observed petitioners unloading marijuana at an eight-acre private estate, violated petitioners' Fourth Amendment rights by entering the grounds and building of the estate and arresting petitioners without a warrant.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 1a-15a) is reported at 611 F. 2d 1066. The supplemental opinion of the court of appeals (Pet. App. 16a-18a) is reported at 615 F. 2d 685.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1980. A petition for rehearing was denied on April 18, 1980. The petition for a writ of certiorari was filed on May 19, 1980 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioners were convicted of conspiracy to possess marijuana (21 U.S.C. 846) and aiding and abetting in the possession of marijuana with the intent to distribute it (21 U.S.C. 841(a)(1) and 18 U.S.C. 2).[1] Petitioner Cusanelli was sentenced to a term of five years' imprisonment; petitioner Fazio was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 1a-15a).

The circumstances leading to petitioners' arrests are fully described in the opinion below. On July 21, 1978, a county police sergeant began intermittent surveillance of a Buick Rivera and its driver, who was later identified as co-defendant John Barnes, as well as a 19 foot "Aqua

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[1]Petitioners were tried together with 12 co-defendants: Scott Butler, Michael Smith, Garrison Barnes, Robert Barnes, John Barnes, Jr., Thomas Wingate, William Hiscock, George Holder, Robert Milne, William McConaghy, Hugh McConaghy and John McConaghy. John McConaghy was acquitted on all counts; the remaining defendants, whose convictions were affirmed on appeal, have not joined in this petition.

Sport" boat that was parked at a Ramada Inn motel near Brunswick, Georgia (S.H. 34). On July 23, co-defendant Robert Barnes joined John Barnes, his brother, and two other co-defendants at the Ramada Inn (S.H. 35-36). The four men transported the boat from the motel to a public landing on the mainland, where they launched the boat and proceeded by water to the nearby St. Simons Island Marina (S.H. 35-36). Later that afternoon the two brothers left the marina in the boat, proceeding north on the Frederica River. They returned to the marina that night. After the boat had made the same trip twice more in the following two days, the county police sergeant contacted the Drug Enforcement Administration, which then joined in the surveillance (S.H. 37). On July 25, a DEA agent flying over the area observed the boat while it was docked at West Point Plantation, a private estate on St. Simons Island that was then being rented by co-defendants Michael Smith and Thomas Wingate.[2]

Meanwhile, on July 24, the Barnes brothers, who had checked into the Ramada Inn on July 20 (S.H. 34), moved directly across the street to a Howard Johnson's Motel (S.H. 35). On July 26, the Barnes brothers went to a Holiday Inn at the same intersection, where they had dinner with petitioners and two other co-defendants who were staying there (S.H. 44-45). The Barnes brothers changed hotels again on July 27, when they moved to a Sheraton Inn that was also located at the same intersection (S.H. 35). On the same day, petitioner Cusanelli was observed packing a jeep at the Holiday Inn, and petitioner Fazio and another co-defendant left the Holiday Inn and proceeded north to Eulonia, Georgia, in a large tractor-trailer truck (S.H. 46-47).

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[2] The estate, which consists of eight acres, is enclosed by a fence on three sides; it is bounded by the Frederica River on the fourth side. The property is accessible by only one road (S.H. 52, 84, 86-88).

The arrest took place on July 28. At about 6:00 p.m., the Barnes brothers launched the Aqua Sport from the St. Simons Marina and headed north on the Frederica River (S.H. 40). At 7:00 p.m., petitioner Fazio arrived with the tractor-trailer truck at the West Point Plantation on St. Simons Island (S.H. 48-49). Agents also saw the jeep crossing over to the island. From the air, another DEA agent observed the Aqua Sport and a shrimp boat at the plantation dock. Shortly after the tractor-trailer arrived, the Aqua Sport sped north up the river (S.H. 40, 50). Although night was falling, none of the plantation's lights was illuminated (S.H. 83).

At about 9:30 p.m., DEA agents and local police set up surveillance of the plantation from a nearby dock and property, from which they observed the plantation through light amplifying "night goggles" (S.H. 58). An arrest team was also posted along the road leading to the plantation, and boats were stationed in the river to observe possible activities there (S.H. 62, 88-89). From their vantage point, agents observed people transferring bundles, which appeared to contain marijuana, from the shrimp boat to the dock, and then to land near the tractor-trailer (S.H. 55, 57).

At this point, the officers had not yet deduced the pattern of the operation. Because the officers had observed the Aqua Sport leave the dock earlier and go north, they speculated that the boat might have gone to meet and return with another shrimp boat carrying more marijuana (S.H. 94-95). They had no idea when the tractor-trailer might leave the area. At approximately 2:30 a.m. agents heard the starting of an engine, which they later determined to be that of a pickup truck, and they saw the brake lights of a vehicle go on (S.H. 61). The DEA agent in charge then decided that the loading

operation must have been completed and that the truck loaded with marijuana was ready to leave. Consequently, he ordered the agents to enter the property and make arrests. As the officers moved closer to the plantation house, people came out of the house and began carrying bundles of marijuana from stacks near the truck into the basement of the house (S.H. 64). Arrests were then made, and the house was secured. Petitioner Fazio was arrested in a bedroom of the house; petitioner Cusanelli was found under the dock.

After the arrests, agents seized 191 bales of marijuana that were in plain view on the ground near the truck and the dock. The agent in charge then obtained search warrants for the house, the vehicles and the hotel rooms (S.H. 72-73; Tr. 394). The execution of those warrants resulted in the seizure of an additional 661 bales of marijuana and other evidence (S.H. 68, 93).

ARGUMENT

Petitioners contend that their warrantless arrests were unlawful under *Payton* v. *New York,* No. 78-5420 (Apr. 15, 1980). Petitioner Fazio argues that the officers' warrantless entry of the house violated his expectation of privacy even if the officers had probable cause to enter the plantation and arrest his co-defendants. Although petitioner Cusanelli was arrested at the plantation's dock, rather than in the house, he contends that his arrest was likewise illegal because the dock was part of the zone of privacy surrounding the house and its curtilage.

At the outset, we note that petitioners had no right to avoid trial even if the arrests were illegal; their remedy is clearly limited to the suppression of any evidence that might have resulted from the arrests. See *Payton* v. *New York, supra,* slip op. 18 n.34; *United States* v. *Crews,* No. 78-777 (Mar. 25, 1980); *Frisbie* v. *Collins,* 342 U.S. 519,

522 (1952). Petitioners, however, do not and cannot point to any evidence that was seized pursuant to their arrests.

Fazio, of course, was arrested while the officers were securing a house that they knew through their own observations to contain marijuana. It is undisputed, however, that no evidence was seized from the house at the time of Fazio's arrest. Only after a search warrant had been procured did the officers seize the marijuana that they had observed being placed in the basement. Petitioners have no basis for seeking suppression of evidence seized at the house pursuant to a valid warrant based on a showing of probable cause that was independent of any observations made inside the house.[3]

Likewise, petitioner Cusanelli has no basis for complaint because the bales of marijuana that were seized in plain view were not the product of his arrest. From a place where the agents were entitled to be, they observed the movement of bales of marijuana by Cusanelli and his co-defendants, who were in public view. See *United States* v. *Watson,* 423 U.S. 411 (1976). Cusanelli had no legitimate expectation of privacy in the plantation grounds where he was visible to public view. *United States* v. *Santana,* 427 U.S. 38, 42-43 (1976). Therefore, the officers' warrantless entry to arrest Cusanelli was appropriate under *Watson,* and the seizure of evidence

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[3]In any event, it is questionable that petitioners' mere presence on the property created any interest protected by the Fourth Amendment in these circumstances. See *Rakas* v. *Illinois,* 439 U.S. 128 (1978).

observed in plain view on the dock was valid. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 465 (1971).

Finally, the exigent circumstances surrounding the unloading operation justified the warrantless entry in any event. See *Payton* v. *New York, supra,* slip op. 10. Officers conducting surveillance of the estate observed the smugglers unloading the marijuana from the boat, but they had no idea when the truck might leave or the smugglers might disperse. When they observed the Aqua Sport proceed up the river again, they assumed that it had gone to meet another shrimp boat with more marijuana. In that case, the tractor-trailer might have stayed on the estate for several more hours or even days, and more smugglers might have arrived with more marijuana. Not until the officers heard the sound of a truck engine did they conclude that the loading operation was completed and that the smugglers were probably beginning to escape from the area. See *Dorman* v. *United States,* 435 F. 2d 385, 392-393 (D.C. Cir. 1970); *United States* v. *Kulcsar,* 586 F. 2d 1283, 1287 (8th Cir. 1978). In these circumstances, a warrantless entry was necessary to prevent the smugglers from escaping under cover of darkness, and, as the district court aptly noted, the officer in charge would have been "derelict in his duties" if he had not acted as he did (S.H. 122).[4]

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[4]Moreover, the Fifth Circuit had held prior to *Payton* that warrantless arrests in the home were permissible. See *United States* v. *Williams,* 573 F. 2d 348 (5th Cir. 1978). Thus, there is no suggestion here that the officers acted in bad faith or in knowing disregard of petitioners' constitutional rights. Consequently, the purpose of the exclusionary rule would not be served by applying *Payton* retroactively in this case even if that holding were applicable in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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